

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 1084 OF 1997
IN
NOTICE OF MOTION NO. 2139 OF 1994
IN
SUIT NO. 3533 OF 1994

1. Subhash Gandhi	)	
	)	
2. Nemichand Ranka	)	
Both of Bombay Indian	)	
Inhabitants having their	)	
address at 2nd floor,	)	
Sonawalla Building, 65,	)	
Bombay Samachar Marg,	)	
Bombay-400 023.	)	.. Appellants. (Org.Plaintiffs)

V/s.

1. M/s. Mistry Brothers	)	
a partnership firm having	)	
its office at 59, Station -	)	
Terrace, N.Bharucha Marg,	)	
Grant Road, Bombay-400 007.	)	
	)	
2. Meherji Kaikhusru Mistry of	)	
Bombay Indian Inhabitant,	)	
having its address at 1,	)	
Lumbini Shop, No.4, Hill	)	
Road, Bandra, Bombay-50.	)	
	)	
3. Khushru Meherji Mistry of	)	
Bombay Indian Inhabitant	)	
r/at. Bungalow No.22, Gokul-	)	
Dham, Goregaon (W), Bombay-62.	)	
	)	
4. Kersi Minoo Guard of Bombay	)	
Indian Inhabitant r/at. 654	)	
Parsi Colony, Dadar, Bombay-18.)	)	
	)	
5. Parsi Panchayat Funds and	)	
Properties, a Public Trust	)	
having its Registered office	)	
at 209, Dr.Dadabhai Naoroji	)	
Road, Fort, Bombay -400 001.	)	
	)	
6. Jamshed Nusserwanji Guzdar	)	.. Respondents.

7. Eruch Byramsha Desai	)	(Org.Defendants)
8. Jamshed Goolfam Kanga	)	
9. Minoo Rustomji Shroff	)	
10.Dr.(Miss) Mehroo Dhunjishaw Bengalee	)	
11. Mrs.Silloo Kaishushru Kavarana	)	
12. Dinshaw Rusi Mehta, Nos. 6 to 12 of Bombay Indian Inhabitants, being the present trustees of the 5th Defendant Trust having their address at 209, Dr. Dadabhai Naoroji Rd.,Fort, Bombay -400 001.	)	.. Respondents. (Org.Defendants)

Mr.N.V.Vimadalal with Ms. Mrudula Kadam i/by M/s.
Vimadalal & Co. for the Appellants.

Mr.Zal T.Andhyarijuna with Ms.Zenobia B.Mistry i/by
Pardiwala & Co. for the Respondents Nos. 5 to 12.

CORAM : R.M.LODHA & S.A.BOBDE, JJ.

DATED : 22nd DECEMBER, 2006.

ORAL JUDGMENT : (PER R.M.LODHA, J.)

. The plaintiffs are in Appeal. They are aggrieved by the order dated 4th September, 1997, whereby the learned motion Judge refused to grant interim relief to the plaintiffs during the pendency of the suit.

2. The plaintiffs (Appellants herein) in the suit, initially prayed for declaration that the agreement dated 16th October, 1993 entered with the defendant No.1 in respect of the suit property (231 sq.mtrs. with the existing ground floor structure situate at Chandanwadi, Bombay) was valid and subsisting and that the defendants No.2 to 4 (partners of defendant No.1) be directed to perform the said agreement dated 16.10.1993 specifically. The plaintiffs also prayed that the defendants Nos. 5 and 6 to 12 be ordered and directed to sign and execute conveyance and other assurances in favour of the plaintiffs for completion of the sale of the suit property. By way of amended plaint, the plaintiffs prayed that they were also entitled to have the agreement dated 11.02.1992 between the first defendant and fifth defendant specifically enforced and that it may be declared that the termination of the agreement dated 11th February, 1992 by the 5th defendant was wrongful and illegal.

3. That the suit property is owned by defendant No.5 is not in dispute. The defendant No.5 is the trust and after completing the necessary formalities by getting sanction of Charity Commissioner, the defendant No.5 entered into an agreement for sale of the suit property with the first defendant on 11.02.1992. Under

the said agreement defendant No.5 is said to have received Rs.1.05 lacs as an earnest money and balance of Rs.8.45 lacs was payable on execution of conveyance. The sale was agreed to be completed within one year. Clause 13 thereof stipulates time being essence of the contract. Since the agreement for sale dated 11.02.1992 between defendant No.5 and defendant No.1 provided the sale of the property to the first defendant or their nominee, the first defendant on 16.10.1993 entered into a contract with the plaintiffs. It is the case of the plaintiffs that the defendant No.1 as well as defendant No.5 avoided the contract. Therefore, they were constrained to file a suit for specific performance of the contract dated 16.10.1993 against the defendant No.1 and specific performance of contract dated 11.02.1992 between the defendant No.1 and defendant No.5. The plaintiffs took out notice of motion, praying for appointment of court receiver and for temporary injunction which came to be dismissed by the learned motion Judge by order dated 4th of September, 1997, giving rise to the present Appeal.

4. Having heard Mr. Vimadalal, the counsel for the plaintiffs and Mr. Zal T.Andhyarijuna, the counsel for the defendants No. 5 to 12, we are of the view that Appeal has no merit and deserves to be dismissed for the

reasons that we indicate hereinafter.

5. As regards the agreement dated 16.10.1993 between the plaintiffs and the first defendant, perusal thereof shows that it is a development agreement. Paragraph 1 of the said agreement read thus :

"1. The principals hereby appoint the Developers, as the Developers and the Developers hereby accept the development rights of the said property from the Principals and to develop the said property more particularly, described in the Schedule hereunder written."

The principals are the defendant No.1 and the developers are the plaintiffs. By this agreement the defendant No.1 appointed the plaintiffs as developers of the suit property and the plaintiffs have accepted development rights from the first defendant. We are afraid, as has been consistently held by this court, that the contract in the nature of development rights is not specifically enforceable.

6. In the contract dated 11.02.1992, the plaintiffs are not the party. The said contract is between the

defendant No.5 and the defendant No.1. Though the said agreement is the agreement of sale between defendant No.5 and defendant No.1, from the perusal of the agreement entered into between the defendant No.1 and the plaintiffs, it cannot be said that an unqualified interest was created in favour of the plaintiffs. The following portion of the agreement would suggest that :

"It is specifically agreed by and between the parties hereto, that if in the event the conveyance of the said property is to be executed and if the Developers are desirous of taking conveyance in respect of the said property directly in their name from the Trustees of the said Trust, then and in the event the Principal shall not object to the same. However, in such event, the Principals shall be the confirming party to such Conveyance and in the event of the Developers desirous of taking conveyance of the said property in their name, the Developers shall pay the entire balance of the consideration amount hereby agreed to be paid by the Developers to the Principals within one month from the date of trustees and Principals obtaining clearance certificate under Section 230-A of the Income Tax Act, 1961 and

required permission under the provisions of Urban Land Ceiling and Regulations Act, 1976 if any and other permission if necessary."

7. It would be, thus, seen that there are many ifs and buts insofar as conveyance of the subject property in favour of the plaintiffs, was concerned. Prima facie, therefore, the plaintiffs cannot have advantage of the clauses in the agreement dated 11.02.1992, which provided that sale of the property of the defendant No.5 shall be done to the first defendant or through his nominee.

8. It is pertinent to notice that insofar as contract dated 11.02.1992 between defendant No.5 and the first defendant is concerned, the said contract stood terminated by defendant No.5 presumably because the defendant No.1 failed to perform its obligation within time; time being the essence of the contract. As a matter of fact, by way of amendment, the plaintiffs have, therefore, prayed that termination of the contract dated 11.02.1992 between the defendant No.5 and defendant No.1 was illegal and wrongful. However, at this stage, in the backdrop of the aforesaid reasons it can safely be said that the plaintiffs are not entitled

to any interim relief.

9. Mr.Vimadalal, the counsel for the appellants cited the following judgments : (i) T.M.Balakrishna Mudaliar vs. M. Satyanarayana Rao & Ors -(1993) 2 Supreme Court Cases 740, (ii) Shyam Singh vs. Daryao Singh- AIR 2004 Supreme Court 348, (iii) Habiba Khatoon vs. Ubaidul Huq & Ors.- AIR 1997 Supreme Court 3236, in support of his contention that the plaintiffs being the assignees from the contracting party of the contract dated 11.02.1992, are entitled to seek specific performance of that contract and challenge the wrongful termination of the contract dated 11.10.1992 by the defendant No.5. None of these judgments improves the case of the plaintiffs for grant of interim relief for the reasons that we have indicated above. It may not be out of place to state here that the suit for specific performance has been filed by the plaintiffs in the year, 1994 and for all these years i.e. more than 12 years, no injunction is operating in favour of the plaintiffs. All in all, no case for interference in the impugned order is made out.

10. Appeal is dismissed. No costs.

11. Needless to say that the observations made by us

in the judgment are only prima facie and for the purpose of the disposal of the Appeal and our decision shall in no way influence the decision in the suit on merits.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)

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